

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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Aim High Investment Group, LLC,

Plaintiff,

v.

Spectrum Laboratories, LLC,

Defendant.

And related counterclaims.

Case No. 2:22-cv-00158-GMN-DJA

Order

This is a trademark infringement case arising out of two companies that both make synthetic urine. Aim High Investment Group, LLC sues Spectrum Laboratories, LLC for a declaratory judgment that its *XStream* product does not infringe on Spectrum's patented formulas containing certain biocides to prevent the urine solutions from experiencing sepsis (*i.e.*, bacterial growth). Spectrum counterclaims for injunctive relief and damages, alleging that Aim High's *XStream* product does infringe on its patents.

Aim High moves to strike Spectrum's infringement contentions, arguing that the contentions are bare-bones and hide the facts and evidence on which Spectrum relies to support its contentions that *XStream* infringes on Spectrum's patents. (ECF No. 42). Because the Court finds that most of Spectrum's infringement contentions are sufficient, but that one is not, it grants the motion to strike in part and denies it in part. The Court will require Spectrum to amend the one infringement contention that is insufficient.

I. Background.

The parties' dispute began in 2020, when Spectrum sent a letter to Aim High asserting that Aim High's *XStream* product infringed on Spectrum's patents: U.S. Patent Nos. 7,192,776 (the '776 Patent) and 9,128,105 (the '105 patent). Aim High responded, asking Spectrum to produce lab testing demonstrating that *XStream* infringed. Spectrum obliged and provided Aim

1 High with a redacted report from S&N Laboratories. When Aim High challenged the authenticity
2 of the report, Spectrum provided Aim High with test results from a second lab: Element
3 Laboratories. The parties were ultimately unable to resolve their dispute through pre-litigation
4 communications.

5 As part of this litigation, Spectrum served its infringement contentions, including that:

- 6 1. For both the ‘776 and ‘105 patents, *XStream* contains a biocide in
7 the form of methylisothiazolinone (MIT).
- 8 2. *XStream* contains sufficient concentrations of biocide to minimize
9 sepsis as required by multiple claims of the ‘776 and ‘105 patents.
- 10 3. *XStream* has at least one disassociated ionic compound in the form
11 of chloride and a specific gravity between 1.005 g/cm³ and 1.025
12 g/cm³ as required by multiple claims of the ‘776 and ‘105 patents.
- 13 4. *XStream* has a urea compound in the form of carbamide peroxide as
14 required by claim 8 of the ‘105 patent.

15 Aim High moves to strike these contentions, asserting that they are vague and
16 unsupported. (ECF No. 42). Aim High asserts that Spectrum could not have created these
17 contentions without detailed chemical testing of the *XStream* product, which testing data
18 Spectrum has not produced and which data the S&N and Element reports apparently do not
19 contain.¹ Aim High asserts that Spectrum has violated Local Patent Rule 1-7(b) by failing to
20 provide the testing data supporting these contentions and has violated Local Patent Rule 1-7(e) by
21 failing to provide testing data showing that Spectrum’s products—named *QuickFix*—embody the
22 patents. Aim High also asserts that the infringement contentions are too vague under Local
23 Patent Rule 1-6(b) and (c) because, without testing data, Spectrum’s assertions that *XStream*
24 contains specific chemicals and specific concentrations of those chemicals is merely speculative.

25
26 ¹ Aim High only explicitly states that the S&N and Element reports that Spectrum produced in
27 pre-litigation discussions do not contain sufficient data to establish one of the infringement
28 contentions at issue: that *XStream* contains MIT. However, given Aim High’s remaining
arguments, it appears that Aim High’s position is that the S&N and Element reports do not
contain information to support Spectrum’s other contentions either.

1 Spectrum responds that its infringement contentions are sufficient because they put Aim
 2 High on notice of its infringement theories. (ECF No. 48). Spectrum argues that it is not required
 3 to produce evidence to support its infringement contentions at this stage.² Spectrum adds that it
 4 has supplemented its infringement contentions to cite to documents in compliance with Local
 5 Patent Rule 1-7(b) and (e), mooted Aim High's arguments under those provisions.

6 Aim High replies and reiterates that Spectrum's infringement contentions are insufficient
 7 because they are unsupported. (ECF No. 52). Aim High asserts that Spectrum's amendments are
 8 also insufficient because they only point to the publicly available file for the asserted patents and
 9 not additional testing data. Aim High adds that Spectrum did not seek to amend its contentions as
 10 required by Local Patent Rule 1-12.

11 **II. Discussion.**

12 "The District of Nevada's Local Patent Rules, like the local patent rules for the Northern
 13 District of California, are designed to require the parties to provide 'early notice of their
 14 infringement and invalidity contentions, and to proceed with diligence in amending those
 15 contentions when new information comes to light in the course of discovery.'"³ *Linksmart*
 16 *Wireless Technology, LLC v. Caesars Entertainment Corporation*, No. 2:18-cv-00862-MMD-
 17 NJK, 2021 WL 201775, at *2 (D. Nev. Jan. 20, 2021) (quoting *Silver State Intellectual Techs.,*
 18 *Inc. v. Garmin Int'l, Inc.*, 32 F. Supp. 3d 1155, 1161-62 (D. Nev. 2014)). Like similar patent

20 ² Spectrum raises other arguments in response to Aim High's motion relating to the parties'
 21 dispute over a third-party subpoena Aim High issued to S&N and Element in the Central District
 22 of California, whether Aim High waived its arguments by not raising them during claim
 23 construction, that Aim High has not cooperated in discovery, and that Aim High's motion is an
 improper summary judgment motion. However, because the Court reaches its conclusion on
 other grounds, it does not reach these arguments.

24 ³ The Local Patent Rules for the District of Nevada at issue are similar to the local patent rules
 25 adopted by the Northern District of California and the Eastern District of Texas. Accordingly, the
 26 Court considers opinions by courts of these districts concerning its local patent rules as
 27 persuasive. *See Silver State Intellectual Technologies, Inc. v. Garmin Intern., Inc.*, 32 F. Supp. 3d
 1155, 1161-62 (D. Nev. 2014) (recognizing the similar designs of the District of Nevada's and
 28 Northern District of California's local patent rules); *Finisar Corp. v. DirecTV Group, Inc.*, 424 F.
 Supp. 2d 896, 897 n.1 (E.D. Tex. 2006) ("The local patent rules for the Eastern District of Texas
 were modeled after the local patent rules adopted by the Northern District of California.").

1 rules throughout the country, the Local Patent Rules “require parties to crystallize their theories of
 2 the case early in the litigation and to adhere to those theories once they have been disclosed.”
 3 *Power Probe Group, Inc. v. Innova Electronics Corporation*, No. 2:21-cv-00332-GMN-EJY,
 4 2021 WL 5280651, at *1 (D. Nev. Nov. 12, 2021) (quoting *Fresnius Med. Care Holdings, Inc. v.*
 5 *Baxter Int’l*, No. C-03-1431 SBA, 2006 WL 1329997, at *4 (N.D. Cal. May 15, 2006)); *see O2*
 6 *Micro Int’l, Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1366 (Fed. Cir. 2006) (“[t]he
 7 rules...seek to balance the right to develop new information in discovery with the need for
 8 certainty as to the legal theories.”).⁴ The rules “provide structure to discovery and enable the
 9 parties to move efficiently toward claim construction and the eventual resolution of their dispute.”
 10 *Creagri, Inc. v. Pinnaclife Inc., LLC*, No. 11-cv-6635-LHK-PSG, 2012 WL 5389775, at *2 (N.D.
 11 Cal. Nov. 2, 2012).

12 “Striking a patentee’s infringement contentions is a severe sanction that should be used
 13 sparingly and only for good cause.” *Avago Technologies, Inc. v. IPtronics Inc.*, No. 5:10-cv-
 14 02863-EJD, 2015 WL 4647923, at *2 (N.D. Cal. Aug. 5, 2015). In the Northern District of
 15 California, motions to strike initial infringement contentions are frequently treated as motions to
 16 compel the amendment of infringement contentions. *Droplets, Inc. v. Yahoo! Inc.*, No. 4:12-cv-
 17 03733-JST-KAW, 2020 WL 4045211, at *3 (N.D. Cal. May 6, 2020). “While some courts have
 18 required a party asserting infringement to show good cause before granting leave to amend initial
 19 contentions, many have simply compelled the asserting party to serve compliant infringement
 20 contentions.” *Id.*

21 The requirements for disclosure of a patentee’s infringement theories are set forth in Local
 22 Patent Rules 1-6 and 1-7. Local Patent Rule 1-6(b) provides that a party must identify each
 23 accused product as specifically as possible. Local Patent Rule 1-7(b) requires a party to produce
 24 all documents “evidencing the conception, reduction to practice, design, and development of
 25 each” accused product. And Local Patent Rule 1-7(e) requires that a party produce documents
 26

27 ⁴ The Federal Circuit governs interpretation and applicability of local patent rules. *O2 Micro Int’l*
 28 *Ltd.*, 467 F.3d at 1364.

1 demonstrating “the operation of any aspects or elements” of the party’s own products that the
2 party claims practices its patents.

3 But the “rules do not, as is sometimes misunderstood, ‘require the disclosure of specific
4 evidence nor do they require a plaintiff to prove its infringement case.’” *Creagri*, 2012 WL
5 5389775 at *2 (internal citations omitted). However, “to the extent appropriate information is
6 readily available to it, a patentee must nevertheless disclose the elements in each accused
7 instrumentality that it contends practices each and every limitation of each asserted claim. *Id.* In
8 its infringement contentions, a party need not prove through evidence that the accused product in
9 fact infringes its patent. *See id.* at *4. Instead, it only has to prove enough information for the
10 other side to understand its theory of infringement. *See id.*

11 *Creagri, Inc. v. Pinnaclife Inc., LLC*, stands for the proposition that a party need not prove
12 through evidence its infringement contentions regarding the specific formulation of a product, but
13 can rely on the other party’s advertising to reach its conclusions. *Creagri*, 2012 WL 5389775 at
14 *1-3. In *Creagri*, the creator of an olive-derived health supplement—Creagri—sued Pinnaclife,
15 alleging that Pinnaclife’s products infringed on Creagri’s patents. *Id.* at *1. Creagri’s at-issue
16 infringement contention asserted that the infringing products “contain a weight ratio of
17 hydroxytyrosol to oleuropein of between 5:1 and about 200:1...Publicly accessible
18 documentation indicates that [the infringing products] are ‘Hydroxytyrosol 7% standardized...’”
19 *Id.* at *3. Pinnaclife argued that the infringement contention insufficiently specified how the
20 amounts of the compounds violated the patent and that Creagri’s reliance on advertising
21 materials—which did not provide the weight ratios of chemicals in the products—failed to
22 provide enough factual support for the contentions. *Id.* Pinnaclife asserted that Creagri needed to
23 provide testing data or other facts to support its contention and moved to compel Creagri to
24 supplement its infringement contentions. *Id.* at *1, 3. The Court, however, disagreed and
25 explained:

26 Pinnaclife’s argument overstates the requirements of Patent L.R. 3-
27 1. Creagri must identify how Pinnaclife’s products infringe with as
28 much specificity as possible with the information currently available
to it. But it is not obligated at this point to supply evidence to
support its infringement theory. Creagri asserts, and Pinnaclife does

1 not dispute, that it relies exclusively on Pinnaclife's publicly
2 available advertisements and marketing materials for its allegations.
3 Disclosure of the factual bases of its allegations is all that is required
4 at this stage.

Id.

5 The Court finds that Spectrum's infringement contentions provide sufficient notice of
6 Spectrum's infringement theories and declines to grant the harsh sanction of striking them.
7 Spectrum has described Aim High's *XStream* product specifically, as required by Local Patent
8 Rule 1-6(b). Indeed, it is not the specificity with which Spectrum describes *XStream* that Aim
9 High takes issue with. Instead, it is the lack of evidence supporting that specificity. But the
10 Court finds that Spectrum has complied with Local Patent Rule 1-7(b) because it has already
11 produced the S&N and Element reports on which it relies.⁵ While Aim High asserts that
12 Spectrum could only have derived its conclusions from testing data beyond the S&N and Element
13 reports, Aim High's assertion and request that Spectrum produce these purported additional tests
14 reads the Local Patent Rules too broadly. Spectrum is not required, at least at this stage, to
15 produce specific evidence or prove its infringement case. And Spectrum has provided the
16 information it has and on which it relies for its assertions in the form of the Element and S&N
17 reports and Aim High's advertising and that of Aim High's distributor. This is sufficient to
18 provide enough information for Aim High to understand Spectrum's theory of infringement.

19 The Court finds that Spectrum's infringement contention are similar to those in *Creagri*
20 which asserted that the infringing product contained specific ratios of compounds while relying
21 on advertising material that did not include those ratios. But the first, second, and fourth
22

23 ⁵ The Court also notes that Spectrum has amended its infringement contentions to include
24 information purportedly falling under Local Patent Rule 1-7(e). However, the Court declines to
25 decide the propriety of Spectrum's amendment and whether the amendment is sufficient to satisfy
26 Local Patent Rule 1-7(e) because those issues are not fully briefed. The crux of Aim High's
27 motion to strike is that Spectrum had not produced evidence demonstrating its testing of *XStream*,
28 and focused little on Spectrum's production of documents demonstrating that its own *QuickFix*
products practice Spectrum's patents. Aim High also did not move to strike on the basis of
Spectrum's improper amendment because Spectrum did not amend its infringement contentions
until after Aim High filed its motion to strike. (ECF No. 48-9 at 15). In any event, the Court will
require Spectrum to amend its contentions—albeit in a different manner—in this order.

1 contentions about which Aim High complains have even more support than those in *Creagri*, as
2 outlined below:


- 3 1. Spectrum's contention that *XStream* contains MIT is supported by
4 the Element report. And while Aim High refutes the reliability of
5 that report, its argument does not mean that Spectrum's reliance on
6 the report is misplaced for the purposes of making its infringement
7 contention.
- 8 2. Spectrum's contention that *XStream* contains sufficient biocide in
9 relation to creatinine to minimize sepsis is supported by Spectrum's
10 observation that *XStream* does not spoil on shelves and the Element
11 report demonstrating that *XStream* contains a biocide. While Aim
12 High asserts that there are other methods than biocides to prevent a
13 product from spoiling, again, Spectrum is not required to prove its
14 case at this stage.
- 15 4. Spectrum cites to the website of *XStream*'s distributor for the
16 contention that *XStream* contains at least one of the urea compounds
17 listed in the patent. While Aim High asserts that Spectrum cannot
18 support its contention because its distributor's website and its
19 packaging only generally identify urea—and not carbamide
20 peroxide more broadly—Spectrum's contentions only assert that
21 *XStream* contains urea. Spectrum's contentions do not assert that
22 *XStream* specifically contains carbamide peroxide. (ECF No. 42-6).

23 On the other hand, Spectrum does not explain where it derived its third contention that
24 *XStream* has at least one disassociated ionic compound in the form of chloride and a specific
25 gravity between 1.005 g/cm³ and 1.025 g/cm³. While Spectrum is not obligated to prove its
26 claim at this stage, it must at least provide the factual basis for this claim, whether it be
27 advertising, testing, or some other source. Because Spectrum did not provide this basis, the Court
28 will require Spectrum to amend this contention. The Court thus finds that Spectrum's first,
second, and fourth infringement contentions are sufficient under the Local Patent Rules and
denies Aim High's motion to strike these contentions. However, because the Court finds that
Spectrum's third contention fails to provide the factual basis for its claims, the Court will grant
Aim High's motion to strike this contention and require Spectrum to amend it.

1 **IT IS THEREFORE ORDERED** that Aim High's motion to strike (ECF No. 42) is
2 **granted in part and denied in part.** It is granted in part regarding Spectrum's contention
3 asserting that *XStream* has at least one disassociated ionic compound in the form of chloride and a
4 specific gravity between 1.005 g/cm³ and 1.025 g/cm³. It is denied in part regarding the
5 remainder of Spectrum's contentions at issue in the motion.

6 **IT IS FURTHER ORDERED** that Spectrum shall amend its infringement contention
7 asserting that *XStream* has at least one disassociated ionic compound in the form of chloride and a
8 specific gravity between 1.005 g/cm³ and 1.025 g/cm³ to include the factual basis for this
9 contention. Spectrum shall serve this amendment on or before **July 20, 2023.**

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11 DATED: June 30, 2023

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14 DANIEL J. ALBREGTS
15 UNITED STATES MAGISTRATE JUDGE
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